

1 JUDGE SIPPEL: How does he bill people then for  
2 what they do?

3 MR. FRIEDMAN: He bills them based on the number  
4 of units that they have so he bills them -- I'm a customer,  
5 just as you. If you have three telephones, you get a higher  
6 bill than if you have one. He's billing the customers on  
7 how many mobiles they have out in the field. It's a mobile-  
8 based billing practice. They don't need to know what their  
9 phone number is. They need simply to have the mobiles in  
10 the mobile facility so the communication can be made.

11 I believe that's what you heard from Mr.  
12 Hollingsworth, is the customer is only concerned that when  
13 he presses the button on his phone or picks it up, he gets  
14 what he wants. He's not concerned that it has a telephone  
15 number or a license number associated. He just wants the  
16 service. It is a service-based billing that Mr. Kay  
17 provides.

18 JUDGE SIPPEL: But from Mr. Kay's standpoint, how  
19 does he manage the efficiency of his -- I don't want to  
20 get -- I'm not trying to second guess anybody's business  
21 practices. But how does he run a business like that without  
22 knowing which customer is operating on which channel?  
23 Because I believe, I'm going to paraphrase now, but what I'm  
24 hearing from the other side of the table is is that you can  
25 run into problems where there is going to be some confusion.

1           MR. FRIEDMAN: He has -- he doesn't run into that  
2    confusion. He has the parties provided with the equipment  
3    that for them does not lead to interference. Their  
4    equipment is associated with the repeaters on the  
5    mountaintops where he knows which mountaintops they're using  
6    because they are going to be operating their mobiles in the  
7    vicinity of the mountaintops in Los Angeles. The customers  
8    have equipment that is set up to deal with that repeater.  
9    They don't get interference. They get service.

10           JUDGE SIPPEL: All right. Let me ask the question  
11   this way then.

12           Supposing that the burden of proof were shifted in  
13   this case, and the burden of proof was put on Mr. Kay to  
14   prove that he had the proper loading with respect to all the  
15   stations that he's licensed for, for this period of time.

16           How would he go about doing that?

17           MR. FRIEDMAN: As he described to you in his  
18   affidavit, he would have to go to the customer base, take a  
19   look at each mobile that was out there, and derive from the  
20   mobile, either by conversation with the customer or by  
21   examination, what repeater -- what station it was associated  
22   with. And then he would take all that back and bring that  
23   into a document and put it in as his case in chief, after he  
24   had done the research.

25           JUDGE SIPPEL: All right. And I take it you're

1 saying -- I mean underlying all of his contention is is that  
2 as though there were a general denial that were filed in a  
3 civil action, he's denying that he's ever had a situation  
4 where he's had a license that has -- either knowingly or  
5 intentionally anyway, not complied with the loading  
6 requirements.

7 MR. FRIEDMAN: I'm only saying that in regard to  
8 his present operations, I believe he may have, at times,  
9 returned licenses to the Commission, but his position is  
10 that he is presently not in violation of that, and if we  
11 were to have, as part of the case presented by the Bureau,  
12 specific stations identified at specific times, we would  
13 deal with that.

14 JUDGE SIPPEL: Well, now, hold on just a minute  
15 though.

16 You've got 164 stations to account for over a  
17 period of years. I mean that's basically what this comes  
18 down to. If he wanted to get rid of this case up front, all  
19 he had to do was give the information to the Bureau and show  
20 them. I mean it seems to me, how big of a deal is that in  
21 the scheme of things as opposed to having, you know, various  
22 numbers of attorneys running around trying to figure out  
23 every which way to Sunday as to not to give them the  
24 information? It doesn't make any sense to me.

25 MR. FRIEDMAN: Well, Your Honor, certainly I don't

1 think that was his intention. But the order doesn't  
2 specify -- say that "On January 1, 1992, you failed to have  
3 the requisite number of mobiles on Station XGJ 321." It is  
4 not stated that way. If that was, we would have responded  
5 with a motion for summary decision and shown you that on  
6 that date at that time there were sufficient mobiles.

7 But we have these vague allegations here. One of  
8 the reasons we've always been pursuing the bill of  
9 particulars is to get that. And I even hear this morning  
10 that while they've got some complaints, they're doing  
11 things, they are looking for things, they're trying to find  
12 information. I wish it was specific as to what he had done  
13 wrong in specific instances, in specific stations, at  
14 specific times. We could respond to specifics.

15 We are here. They are asking for all kinds of  
16 information because they're going to go run around with it  
17 and do things. That's our problem. There isn't any  
18 specifics.

19 JUDGE SIPPEL: Wait, wait a minute, wait a minute.  
20 They're not going to run around and do things with it. Not  
21 as long as this case is in litigation. They're going to do  
22 things that are proper to do. But I mean they're in a law  
23 enforcement element here.

24 MR. FRIEDMAN: Right.

25 JUDGE SIPPEL: And they're not going to run amuck.

1 But I'm just bothered by this. Obviously -- I don't want to  
2 say "obviously." Let me rephrase this.

3 The Bureau, in its work with respect to the Kay  
4 stations, and I don't mean just in this litigation, has  
5 obviously -- I use that word again -- it appears have become  
6 frustrated because they can't make the bottom line  
7 determination with respect to loading, appropriate loading,  
8 because they just don't have the information. So how can  
9 they write it off and say, "Hey, we can't make a  
10 determination here so we'll assume there's no problem"?

11 On the other hand, I mean again going back to  
12 January of 1994, as hard and as painstaking as it might be,  
13 based on Mr. Kay's affidavit, it seems to me that there was  
14 a way -- assuming that he's keeping his records as you've  
15 outlined it, contra (sic) to all the experience that the  
16 Bureau has amassed here and seen in their lifetime. But  
17 he's keeping them his way.

18 Wouldn't it have made a heck of a lot of sense to  
19 just sit down and give the Bureau what they want and say,  
20 "Go away"? But he wouldn't do that. He just won't do that,  
21 and he still won't do it.

22 MR. FRIEDMAN: Well --

23 JUDGE SIPPEL: And I want to know -- it doesn't  
24 make any sense to me.

25 MR. FRIEDMAN: Well, one thing. I'm not speaking

1 to what happened at the first receipt of the 308(b) request.  
2 At that point Mr. Kay and his counsel felt there was a legal  
3 basis for responding as they did. I can talk to you today,  
4 the information that is in his possession has been given,  
5 and there is no rule from this Commission that says to any  
6 particular licensee how the information is to be kept, where  
7 it is to be kept, in what order it is to be kept, and how  
8 long it is to be kept. Zero about that. All we have are  
9 the words "Business record in the 1992 rulemaking."

10 He keeps his business records. Perhaps he keeps  
11 it the way they don't like it. But that's a problem.

12 I hear all morning that they need more  
13 information. They can send another round of  
14 interrogatories. Do they have a question that on January 1,  
15 1994, a particular station was not fully loaded? We will do  
16 our best to try to get that information. But we don't have  
17 that at the moment. We don't have -- we're not in a  
18 position nor do we have to find information to make it up.  
19 All we can give in response to an interrogatory is the  
20 Commission and the federal rules provide is what we have and  
21 Mr. Kay is providing it.

22 Perhaps they don't like the way he acts as a  
23 businessman. Maybe he's even a lousy businessman, for  
24 argument's sake. But that is not the reason for terminating  
25 his license on the basis that he doesn't have the right kind

1 of information or the information that Nextel or Bell  
2 Atlantic or some billion dollar company might have. That's  
3 just the way it is. This is a one-man show here.

4 JUDGE SIPPEL: Well, I want to be sure -- I mean  
5 the Bureau has not even suggested this and I'm not -- we're  
6 into a bit of an argumentative phase here, and there is no  
7 inference to be drawn from this that anybody is saying that  
8 Mr. Kay is not operating his business in a way that a  
9 businessman should or in an inefficient way. That's not the  
10 issue here.

11 The issue here is whether or not -- is why he  
12 didn't give the information to the Bureau in the form that  
13 they want. You're saying -- or he's saying in his affidavit  
14 because he doesn't keep it that way.

15 MR. FRIEDMAN: That is correct. And there is no  
16 requirement in the rules of this Commission that a party  
17 that receives an interrogatory should make up information.  
18 All we're supposed to do is give you the information we  
19 have. If we don't have that, we can't give it to you.  
20 That's just the reality. We're giving them what we have.  
21 And if they want more information, they have a right to  
22 another round of interrogatories. And from that, perhaps  
23 they can get it down to what they need.

24 JUDGE SIPPEL: I'm starting to repeat myself here.  
25 Is there anybody on the Bureau's side that cares

1 to respond to what this argument is saying?

2 MR. HOLLINGSWORTH: I'd like to respond briefly.

3 JUDGE SIPPEL: Mr. Hollingsworth.

4 MR. HOLLINGSWORTH: If you look at the order, we  
5 do say what business records are. Paragraph 18, 7 FCC,  
6 Record No. 18, page 5050, 55, 60. We say that "Business  
7 records should constitute invoices, customer service  
8 agreements, customer lists or any other type of record kept  
9 in the ordinary course of business. We would not require  
10 those records with the application itself, but could require  
11 licensees to provide them to substantiate loading figures."  
12 There again, we specifically link it to loading. "Loading  
13 figures at a later date."

14 JUDGE SIPPEL: Would you give me that citation  
15 again? That's 7 FCC Record 5 what?

16 MR. HOLLINGSWORTH: 5560.

17 JUDGE SIPPEL: 5560.

18 MR. HOLLINGSWORTH: Paragraph 18. And paragraph  
19 21, at 5561, states that -- and, again, this is in terms of  
20 loading -- "The new rules rely on standard business records  
21 that licensees should already be keeping in the ordinary  
22 course of business. Given that loading figures may be taken  
23 from ordinary business records, we do not believe that their  
24 compilation will be unduly burdensome to licensees."

25 Now, what Mr. Friedman said about a customer not



1 caring is exactly right. He doesn't care whether it goes  
2 by, one length is microwave, one link is telephone line, or  
3 whatever. He just wants to know he's being fairly billed.

4 But that customer does care that when he calls one  
5 of his trucks that it doesn't access UPS or Federal Express  
6 or a hospital.

7 JUDGE SIPPEL: Uh-huh.

8 MR. HOLLINGSWORTH: And for that to work, then  
9 each one of his customers' radios in the truck had to have  
10 been programmed to access a certain station. Just like as a  
11 telephone user, I don't care how the phone company does it.  
12 I just want to know that when I dial in number in Fairfax,  
13 the same number in Billings, Montana, doesn't answer.

14 And so somewhere in all of that configuration and  
15 that infrastructure, somebody has to take my phone number  
16 from my area and make sure it goes, when I dial that number,  
17 it connects with Fairfax and not Montana. Somewhere that  
18 has to be done.

19 JUDGE SIPPEL: All right. So let me follow that.  
20 So what someone in Mr. Kay's situation has to do, when the  
21 trucking company or the plumbing company signs a deal with  
22 him, he's going to have to tell -- Mr. Kay is going to have  
23 to tell this trucker which of the Kay licenses he can dial  
24 up on, on his -- whatever he's got.

25 MR. HOLLINGSWORTH: He doesn't necessarily have to

1 tell him, but Kay has to know it, because otherwise there's  
2 mass chaos among all his other paying customers when this  
3 guy tries to use his newly purchased radio equipment, and  
4 nobody would tolerate it. He doesn't have to know, but he  
5 has to know that when he calls truck number 4 that all the  
6 Federal Express trucks don't come back and say, "What are  
7 you calling us for? We're not plumbers. We're delivering  
8 packages." He has to configure his station to do that, just  
9 as the phone company has to configure telephone numbers.

10 JUDGE SIPPEL: Now, when you say that he has to  
11 configure the station, you mean Mr. Kay has to configure the  
12 stations?

13 MR. HOLLINGSWORTH: Exactly. He has to -- that  
14 equipment automatically accesses. We know he has a finite  
15 number of end users and a finite number of stations. And so  
16 if he would make those connections and links for us, we  
17 could decide some of these issues.

18 What Mr. Friedman is saying would be the same  
19 thing as my telling the IRS, "Well, look. Tell me what  
20 month you want the income for. If you want to know what  
21 income I made in March, just tell me. That's all you have  
22 to do." They don't want to know that. They want to look at  
23 your year's income, the whole configuration of the period  
24 they're concerned about.

25 JUDGE SIPPEL: Oh, I understand that. I don't

1 mean to interrupt you, but let me go back to Mr. Friedman on  
2 that.

3 How about that situation, Mr. Friedman, the  
4 scenario that Mr. Hollingsworth just gave? I mean how does  
5 Mr. Kay -- how does he keep track of his configurations if  
6 he doesn't have some way of identifying a station with a  
7 customer?

8 MR. FRIEDMAN: Again, he knows the stations -- he  
9 knows -- he identifies by the mobiles. If I'm a taxi  
10 company and I have 12 taxis, he charges me for my 12 taxis.  
11 Now, how is that done? The taxis have the mobiles. When  
12 the mobiles are installed, they were set up to deal with one  
13 of the frequencies on the mountain that they're working on.  
14 But he doesn't keep the records as to which repeater they  
15 were assigned to. He knows though that this is a Mount  
16 Lukins taxi service, and anybody who is part of that gets a  
17 mobile that has access to the Mount Lukins frequencies.

18 So there isn't any problem. They don't get  
19 frequencies to Mount Wilson or Palomar or anything like  
20 that. They get the Mount Lukins. They operate there. And  
21 when they get billed, they get a bill that says for January  
22 1996. You know, ABC Taxi, 12 mobiles. And you agreed when  
23 you signed up of X dollars per month per mobile. And they  
24 get a bill and they pay it.

25 JUDGE SIPPEL: But how is he -- if I'm

1 paraphrasing Mr. Hollingsworth's situation accurately, how  
2 is he sure that he's giving the right station to the  
3 plumbing company and he's not inadvertently giving it to two  
4 people or that, you know, there's not going to be a mistake  
5 made with respect to all of a sudden the plumbing company is  
6 calling up on the UPS number or something like that. I mean  
7 how --

8 MR. FRIEDMAN: Because they were originally set up  
9 that way and then once they're set up, they go out and he  
10 doesn't keep track of that.

11 JUDGE SIPPEL: Well, how about the original  
12 setting up? Are there records of the original setting up?

13 MR. FRIEDMAN: Now, I don't know. Obviously -- I  
14 mean if one was to make a discovery request, we could find  
15 out. I can't speak for him as to how he's done all his  
16 business practices. All I can speak for is the affidavit  
17 that was provided that said this is the information the way  
18 he has it in his business records as of today.

19 JUDGE SIPPEL: Is that conceivable? Maybe Mr.  
20 Fishel would like to answer that question. Is it  
21 conceivable that he could have set this thing up the right  
22 way, with all the assignments of the stations, and then just  
23 walked away from the station numbers in a sense? I mean in  
24 the business record sense.

25 MR. FISHEL: Yes, in my opinion it's possible but

1 extremely unlikely because what Mr. Friedman is saying now  
2 is he provides -- the present status is in response to an  
3 interrogatory. That's what exists now.

4 At the time Mr. Kay acquired these facilities,  
5 what you've got to understand is that the applicant or the  
6 licensee had a vertical requirement for purposes of  
7 acquiring additional frequencies for a facility or  
8 additional facilities in the same area. What that means is  
9 I have Facility A. I'm not entitled to get more channels  
10 for Facility A or any additional facilities in the same  
11 service area as Facility A until I've loaded Facility A.  
12 Then I can get Facility B and so forth.

13 But what Mr. Kay's response seems to suggest is  
14 that if I apply that same criteria then as I did now, he  
15 couldn't legitimately say, "I have loaded A before I have  
16 acquired B." What he's saying is, "I just have so many  
17 users, they are using all the facilities."

18 I don't know if that was confusing --

19 JUDGE SIPPEL: I'm going to see if Mr. Friedman  
20 can respond to that.

21 MR. FRIEDMAN: Well, the answer -- and, again, I  
22 don't know because I've not been asked to get that  
23 information. I think though he could say to you, "At the  
24 time I had A. I filled A. I got B. I filled it all up to  
25 the point where I was totally filled with everything I had,

1 and then I started adding people on. And I have not  
2 maintained that record of how -- of when I went over the  
3 loading for the first one to go to the second one, because  
4 I'm not required by the rules to maintain those records."  
5 There is no rule in Part 90 as to the time of maintaining  
6 these. And we've not heard them tell us that.

7 And, by the way, that's a totally new issue,  
8 records maintenance. That wasn't within the designated  
9 issues.

10 JUDGE SIPPEL: Well, we're not -- what I'm trying  
11 to get at anyway is I'm trying to get at is why the Bureau  
12 has had such a difficult time getting information that  
13 they've been asking for, and what you're saying is because  
14 Mr. Kay doesn't keep information in the format that they  
15 would expect to see it. That's what you're telling me.

16 MR. FRIEDMAN: Right. He has a format. I'm sorry  
17 that his format is not what they want. But this is all he  
18 can do is give them what he has. And they can have  
19 discovery of him in person, in depositions, and perhaps  
20 derive that information. Give him another set of  
21 interrogatories, which he will answer, because he is  
22 answering interrogatories. And maybe that will help. But  
23 you can't make something out of nothing. He can't make up  
24 things he doesn't have a present ability to swear to. All  
25 he can swear to is what he has.

1 JUDGE SIPPEL: Well, I can tell by the flow of the  
2 papers over the last two years that -- I'm not so sure that  
3 his approach has been quite all that reasoned. It would  
4 take -- he's indicated it would have taken him, what, 60 to  
5 90 days to go back and find -- and check all the customers.  
6 And I mean that was never even attempted. And yet, you  
7 know, here we are, this case just keeps floating along.

8 Do you want to say anything more to this?

9 MR. HOLLINGSWORTH: I have one comment.

10 JUDGE SIPPEL: Yes, Mr. Hollingsworth.

11 MR. HOLLINGSWORTH: Mr. Friedman indicated that we  
12 didn't give specifics. We gave the most specific thing that  
13 the Commission has to give out and that's call signs.  
14 Because to get a call sign, you have to ask for it, number  
15 one. You have to specify longitude and latitude of the  
16 station. Frequency, antenna height and any number of  
17 things. If you look at one of our forms, you can tell.  
18 There's nothing more specific we could have given them than  
19 the call signs and records for that.

20 JUDGE SIPPEL: So you gave them the call signs and  
21 he doesn't keep his records based on the call signs? He  
22 keeps them --

23 MR. HOLLINGSWORTH: Well, that's what he said.  
24 That's what we're being told.

25 JUDGE SIPPEL: Mr. Friedman.

1           MR. FRIEDMAN: What I said was not on  
2 individual -- you got call sign designations for each piece  
3 of paper that were based on the location, that he has them  
4 by location, call signs at certain locations. That's what  
5 his answer is. Not that he doesn't have them by call signs.

6           MR. HOLLINGSWORTH: Well, obviously there has to  
7 be a limited number of locations. There's a limited number  
8 of mountains that you can count. We know that there's going  
9 to be numerous systems on the same mountain.

10          MR. SCHONMAN: Your Honor, you know it's very easy  
11 to sit here and for Mr. Kay to advance the convenient  
12 argument that he just doesn't keep the information in the  
13 format which the Bureau would like. And that's a problem,  
14 he said.

15                 Well, it's a problem for whom? The fact of the  
16 matter is the Commission has a statutory regulatory duty to  
17 oversee thousands upon thousands of licensees. And we have  
18 questions here about whether Mr. Kay has complied in the  
19 operations of his stations.

20                 Now, in order to carry out the statutory  
21 obligations that we have, the law allows us to ask for  
22 information. It's convenient to sit back and say, "Gee, we  
23 just don't have it. Go away, Commission." But, gee, it  
24 just doesn't stop there. Mr. Kay is not operating a shoe  
25 store. He's operating in a regulated industry. And he



1 knows that.

2 JUDGE SIPPEL: Well, I'm sort of getting towards  
3 the end of what I wanted to cover here.

4 I've got another question though and that is with  
5 respect to the -- let me ask this to Mr. Friedman.

6 With respect to the permits for the land use on  
7 the Forest Service land. Why is that such a problem to give  
8 the Bureau what they're asking for there? It was in the  
9 letter, going back to January of '94. They simply said,  
10 "Hey, if you're operating a station on Forest Service land,  
11 give us a copy of the permit." And the answer was -- well,  
12 I don't even want to get into what the answer was, but here  
13 we are, two years later, and they still don't have that  
14 information? Or do they?

15 Do you have all that information?

16 MR. KELLETT: We have a lot of Forest Service  
17 permits, Your Honor. Whether we have them all or not, we're  
18 not sure. And your order compelling him to produce  
19 additional information indicated that we weren't to file  
20 another motion to compel promptly. We were to question him  
21 at his deposition, find out what documents might exist  
22 elsewhere, and then file another motion to compel.

23 So quite frankly we don't know, but we do have a  
24 substantial number of Forest permits at this point.

25 JUDGE SIPPEL: And what do you want the Forest

1 permit to show? What stations are constructed -- am I using  
2 that terminology correctly?

3 MR. KELLETT: The way the Forest Service requires  
4 you to pay them when you build up on their mountain, and  
5 some of the complaints said Kay doesn't have Forest Service  
6 permits for these stations. We thought that that was pretty  
7 good evidence that he didn't in fact build those stations.

8 Whether it is or not, that's something you'll have to  
9 determine at hearing.

10 I think that Mr. Kay's response is, "Whether I'm  
11 cheating the Forest Service out of user fees or not, is  
12 really not proof that I didn't build it. You know, if I  
13 neglected to file, I owe them back fees, but you shouldn't  
14 be canceling my --"

15 MR. FRIEDMAN: Well, I don't like the word  
16 "cheating," Your Honor. And that's an insinuation --

17 MR. KELLETT: Well, neglected to pay the Forest  
18 Service. I stand corrected.

19 JUDGE SIPPEL: Well, all right. I -- but let  
20 me -- I mean I still want to know. You got information.  
21 You got copies of permits. But do you know that you got --  
22 you don't know whether or not you got all the permits that  
23 are relative to that question?

24 MR. KELLETT: Permits don't have call signs on  
25 them.

1 JUDGE SIPPEL: But did Mr. Kay make an effort to  
2 say, "Okay. For this permit, here's what's on there?  
3 Here's a permit --"

4 MR. FRIEDMAN: I don't believe the question was  
5 asked exactly that way, Your Honor.

6 JUDGE SIPPEL: The letter I thought was pretty  
7 clear.

8 MR. SCHONMAN: Your Honor, in the pre-designation  
9 letters of inquiry, the Commission did request the Forest  
10 Service permits. Interrogatory No. 4 does not specifically  
11 ask for that. I believe that we asked for that information  
12 in another interrogatory.

13 MR. KELLETT: In a document request.

14 MR. SCHONMAN: In a document request. Excuse me.

15 MR. HOLLINGSWORTH: The reason that we can't  
16 totally rely just on Forest Service records too, is that the  
17 Forest Service doesn't know about radio frequencies. And  
18 they don't have access to these sites without the licensee  
19 there. So we don't feel like it's a totally reliable  
20 indication of what frequencies are on what mountaintops.

21 JUDGE SIPPEL: Well, I'm trying to ascertain at  
22 the present time what is the status of the information that  
23 you've received from Mr. Kay with respect to the Forest  
24 Service areas where he has stations located?

25 MS. WYPIJEWSKI: He declined, Your Honor.

1 JUDGE SIPPEL: He declined?

2 MS. WYPIJEWSKI: He declined to give us that  
3 information. We had complaints, oral complaints, over the  
4 telephone from people saying that Mr. Kay was pretending,  
5 they believed, to have more and more loading so that he  
6 could get more and more channels, as Mr. Fishel explained.  
7 But yet that he was telling the Forest Service he had less  
8 and less and less so he would have to pay them less since  
9 they charge a percentage.

10 Our idea was to work with the Forest Service,  
11 government to government, and compare what the Forest  
12 Service thought he had, what the FCC's records said he had,  
13 and what Mr. Kay said he had, and compare the three.

14 Our problem was that we have never gotten Mr.  
15 Kay's records to do the comparison.

16 JUDGE SIPPEL: What specific records were you  
17 looking for?

18 MR. SCHONMAN: Loading.

19 MS. WYPIJEWSKI: His loading, because then they  
20 would charge him a percentage.

21 JUDGE SIPPEL: So you're back to loading data for  
22 a station --

23 MS. WYPIJEWSKI: Loading is so critical.

24 JUDGE SIPPEL: And it's just a question of  
25 tracking that loading data for the stations that's on the

1 Forest Service land --

2 MS. WYPIJEWSKI: We're still in touch with them.

3 I just spoke with them yesterday.

4 JUDGE SIPPEL: Being the Forest Service people?

5 MS. WYPIJEWSKI: Yes, Your Honor.

6 MR. SCHONMAN: It all comes back to loading, Your  
7 Honor.

8 MR. HOLLINGSWORTH: And we're fully aware that  
9 this is a one-man operation. We're also aware that this one  
10 man has accumulated over 150 radio licenses in one of the  
11 most congested markets in the country. Claims to have  
12 somewhere in the vicinity of 7000 customers. He has not  
13 told us that he is a philanthropist, so we assume that he's  
14 sending out bills for those customers. And that's what the  
15 whole thing --

16 JUDGE SIPPEL: Well, no, I'm assuming that this a  
17 commercial operation. I mean this is a business.

18 MS. WYPIJEWSKI: And 7000 customers would have  
19 generated a lot of income for the Forest Service, which  
20 they're not seeing.

21 JUDGE SIPPEL: Well, again, that's an  
22 allegation -- yeah, we're still into --

23 But my point, what we're here about today is  
24 information that was requested that you haven't gotten. And  
25 that's the beginning and end of today's discussion really.

1                   Do you want to add anything more to this, Mr.  
2     Friedman?

3                   MR. FRIEDMAN: Yes, Your Honor. I'll be very  
4     brief.

5                   To put this back in the context of why we were  
6     invited to come here this morning. It has been about an  
7     hour and a half, and I think everybody in the room would  
8     agree that the focus of this pre-hearing conference, if  
9     that's what it's properly called, has been on factual  
10    questions.

11                  And what I think we need to do is to bring it back  
12    into the context of why we're here. And that is the pending  
13    -- the Bureau's pending motion for summary decision.

14                  And, again, what we learned in this about an hour  
15    and a half is that there are millions upon millions of  
16    factual issues that have been raised that, again, that was  
17    the focus of the conference this morning.

18                  And when we put that into context of the Bureau's  
19    pending motion for summary decision, it almost answers  
20    itself. You know, for the Court to grant a motion for  
21    summary decision, there can't be any factual issues in  
22    dispute. And, of course, we just went through an hour and a  
23    half of factual issues, and I would suggest that we didn't  
24    even scratch the surface of all the factual issues.

25                  So my point is I think we need to -- you know,

1     there is no basis for a summary decision and we need to  
2     continue on with discovery and get some of these outstanding  
3     issues addressed in depositions and perhaps more  
4     interrogatories and production of documents.

5             JUDGE SIPPEL: Well, let me just clear the air on  
6     one thing.

7             There was a lot of factual discussion here this  
8     morning, you are absolutely right. But it was for purposes  
9     of my educating myself with respect to what's at stake here,  
10    and the failure of Mr. Kay to produce information that's  
11    been requested of him. That's what this is all about. And  
12    plus the question that I had framed in the order setting  
13    this up.

14            And we've covered these areas I think very  
15    carefully, and I think with great deference to counsel for  
16    Mr. Kay to be in a position to respond to anything that he  
17    felt was not in his client's interest that's been said here.  
18    And this has been a very -- I thought a very -- from my  
19    standpoint anyway, a very enlightened and educational  
20    discussion of what's behind all of this rulemaking -- rather  
21    these record-keeping requirements.

22            MR. FENSKE: Your Honor, I would certainly not  
23    disagree with that statement, but I'm suggesting there are a  
24    lot of factual issues that have not been laid to rest, so to  
25    speak, and that are out there that need to be decided on

1 after a full hearing.

2 And one additional point I think that needs to be  
3 made is that the focus this morning suddenly shifted from  
4 this willful deliberate violation of 308(b) I think, into an  
5 issue of did Mr. Kay have an obligation to keep the loading  
6 records. And I would cite the FCC record citation that Mr.  
7 Hollingsworth provided.

8 The focus, I would suggest, shifted from this "bad  
9 actor", as the Bureau has alleged, into "did he have an  
10 obligation to keep that record?" Again, another factual and  
11 legal issue, whether he did, and whether he was obligated to  
12 do so.

13 JUDGE SIPPEL: Mr. Schonman.

14 MR. SCHONMAN: Your Honor, I would submit that you  
15 are fully aware of what the focus of your own conference is  
16 about. There is only one pleading before you and that's the  
17 motion for summary decision and related filings.

18 There really is nothing further to discuss at  
19 hearing insofar as the 308(b) letter is concerned. We've  
20 provided ample factual evidence of repeated failures to  
21 provide information to this agency. And I haven't heard one  
22 piece of evidence, not one excuse, not one reliable piece of  
23 defense as to why the information requested in 1994 was not  
24 properly and timely submitted. And I haven't heard one  
25 reliable piece of evidence as to why we have to keep



1 groveling for information during discovery. It's  
2 preposterous. And Your Honor shouldn't tolerate it.

3 I think the 308(b) issue, which is the matter  
4 before you, is fully ripe for disposition at this time  
5 because this has gone far enough. I mean what do we have to  
6 do? What does the Bureau, what does the agency, what does a  
7 regulatory agency have to do to get information from the  
8 people it licenses?

9 JUDGE SIPPEL: Well, I know exactly what you're  
10 saying but my job is a little bit different. I mean I do  
11 have to apply all the standards that go into, not only  
12 summary decision, but also depriving somebody of their  
13 licenses for basically what you're saying, for failing to  
14 comply with discovery requests, which it's in a pre-  
15 designation setting, as carried over into the hearing, or  
16 whatever.

17 So I don't view this as being an easy question.  
18 And therefore I felt it was worth taking this amount of  
19 time.

20 What I intend to do is I intend to certainly wait  
21 for the transcript before I reach a point where I would make  
22 a decision one way or the other on this. It's still under  
23 advisement as far as I'm concerned. And I understand that  
24 that -- I've got two tensions going here. One, I feel very  
25 strongly that this issue should be resolved if I feel that